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IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

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JAMES H. McKENNEY,
Clerk.

No. 217

COSMOS EXPLORATION COMPANY, *Appellant*

vs.

GRAY EAGLE OIL COMPANY, *et al., Appellees*

No. 218

PACIFIC LAND AND IMPROVEMENT COMPANY, *Appellant*

vs.

ELWOOD OIL COMPANY, *et al., Appellees*

APPELLANTS' REPLY BRIEF.

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THE BYRNE CO.

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APPELLANTS' REPLY BRIEF.

As these cases are now presented to the court by the oral argument and the original and reply brief of appellees, the real issue between the parties has narrowed down to but one single question, namely: WHEN DOES EQUITABLE TITLE VEST UNDER THE ACT OF JUNE 4, 1897?

Before replying to the arguments advanced by our opponents in support of their position that the equitable title never vests under any act of Congress until the land department has finally approved the proceedings had for the acquiring of such title and decided that the equitable title has vested, it may be well to dwell for a moment upon the questions that—either by express concession or by tacit abandonment—have been eliminated from this controversy.

ABANDONED ISSUES.

No Reliance Placed Upon the Departmental Requirement of a Non-occupancy Affidavit.

It will be noticed, that in appellees' reply brief, no attempt is made to sustain or justify the arbitrary requirement of the land department (exacting for the first time in the Kern Oil Company case, nearly a year and a half after these selections were made) that a non-occupancy affidavit shall be filed with all selections under the act of June 4, 1897, as a part of the things to be done by the selector before the equitable title to the selected land can vest.

We are not surprised that our opponents should thus abandon all attempts to bolster up this indefensible position of the department. In our opening brief, pages 132 to 161, we showed conclusively, we think, that no such regulation of the department *ever existed;* that it would have been *void* had it existed, and that, even assuming such regulation to have existed, and to have been valid, the requirement had been *waived* by the practice of the department in never exacting such an affidavit, and by ISSUING HUNDREDS OF PATENTS UNDER SUCH ACT WHERE NO SUCH AFFIDAVIT WAS MADE OR REQUIRED, and that no selections had ever been rejected for lack of such an affidavit until nearly a year and one-half after these selections were made; and in these cases that such affidavit was waived by the Register and Receiver accepting and certifying the selections without requiring such affidavit.

The significance of counsel's tacit abandonment of this requirement, as "a part of the things required to be done" by the selector, precedent to the vesting of the equitable title, is doubly emphasized in view of the fact that the whole controversy has—by other concessions of counsel—resolved itself into the single question, as to *when* equitable title vests under this act With the issue thus narrowed, the

importance of being able to hold that equitable title does not vest until a non-occupancy affidavit is filed, is at once obvious; and it is only reasonable to believe that nothing but the absolute indefensibility of such position, and the utter futility of any arguments that might be urged to support it, could have induced so astute a lawyer as Judge Chapman to have abandoned this contention, at a time when so much depended upon sustaining it.

Appellees Concede That Equitable Title Once Vested Cannot be Affected or Impaired by subsequent Mineral Discoveries.

Upon the oral argument, counsel for appellees conceded, and at numerous places in appellees' reply brief, it is conceded, that if equitable title has once vested, no subsequent discovery of mineral can affect or impair such title.

The authorities are so overwhelming to this affect that we are not surprised that counsel for appellees has arrived at the conclusion that it is useless any longer to try to sustain a contrary doctrine.

The concession, however, is important, as it materially narrows the issue between us and leaves but the one question in the case, and that is: When does the equitable title vest under this act?

SURVIVING ISSUES.

As we have stated many times, we claim that such title vests when the selector has done everything required of him by the statute, namely, when he has relinquished to the United States his patented land in a forest reserve and has selected in lieu thereof an equal area of "vacant land open to settlement." Our opponents claim that equitable title to the selected land never vests until the land department has approved the selection and lost all jurisdiction of

the subject matter. This doctrine of appellees', is stated by their learned counsel in several different ways, as follows:

FIRST. THAT EQUITABLE TITLE TO PUBLIC LAND, NEVER VESTS, UNTIL THERE HAS BEEN AN ADJUDICATION OR DETERMINATION, BY THE LAND DEPARTMENT, THAT IT HAS VESTED.

SECOND. THAT UNTIL THE LAND DEPARTMENT LOSES ALL JURISDICTION OVER A SELECTION, EQUITABLE TITLE TO THE SELECTED LAND CANNOT VEST, AND THAT CONTINUING JURISDICTION TO INQUIRE INTO THE QUESTION, AS TO WHETHER EQUITABLE TITLE HAS VESTED, IS INCOMPATABLE WITH THE CLAIM, THAT SUCH TITLE HAS ALREADY VESTED.

THIRD. THAT A SELECTOR, OR PURCHASER OF PUBLIC LANDS, HAS NEVER "DONE ALL THAT IS REQUIRED OF HIM" BY THE LAW, UNTIL HE HAS DONE "WHATEVER MAY EXPRESS THE APPROVAL OF THE LAND DEPARTMENT AS A PART OF THOSE THINGS WHICH HE HAS TO DO."

FOURTH. THAT A RELINQUISHMENT TO THE UNITED STATES OF FOREST RESERVE LAND, AND THE SELECTION OF A SIMILAR AREA OF VACANT LAND OPEN TO SETTLEMENT BELONGING TO THE UNITED STATES, IS NOT DOING ALL THAT THE SELECTOR IS REQUIRED TO DO, BECAUSE THE RELINQUISHMENT CAN NEITHER BE CONSIDERED "PAYMENT" FOR THE SELECTED LAND, NOR A TECHNICAL "DELIVERY" OF THE DEED OF THE RELINQUISHED LAND.

We will answer these several contentions of counsel for appellees in the order above mentioned.

The claim that equitable title to public land never vests, until there has been an adjudication, or determination by the land department, that it has vested.

In the original brief of our opponents in these cases at the bottom of page 77 and the top of page 78, after re-

viewing the numerous decisions holding that the land department has supervisory jurisdiction until patent issues, to determine as to whether or not the law has been complied with, and as to whether or not title to a certain piece of land should issue, a resume of all the points decided by such cases is given ; and it is said, that such cases hold

> *"That an equitable title does not pass ever until there has been a decision of that special tribunal upon these questions, and it has been determined that the applicant possesses the qualifications of a purchaser, that he has complied with the terms of the statute and that the lands which he seeks to purchase are of the class that he is entitled to purchase."*

And again on page 104 of the same brief, after quoting some of our strongest cases holding that only mineral *"known at the time of the sale"* can be taken into consideration in determining the character of land, Mr. Chapman concludes with the following startling *non-sequitur*, viz. :

> *"And from the cases already cited and many others, it follows that it is not until there is this judgment of the land department that the lands are of the character sought to be purchased or selected that any title passes."*

We submit that these conclusions of counsel in no wise follow from the authorities from which they are drawn, and that they are absolutely and fundamentally unsound ; as they make the vesting of equitable title depend not upon *paying the purchase price, or other full compliance with the law upon the part of the applicant*, but upon some action of the officers of the land department, such as the issuance of a certificate, or a receipt, or some other paper intended only as *evidence* that the equitable title has passed ; whereas the

decisions of this court and the land department are innumerably holding that *it is payment of the purchase price, or other full compliance with the law upon the part of the applicant that vests the equitable title;* and we challenge counsel to furnish a single case holding that it is the finding or judgment of the land department, or the issuance of a certificate or receipt or any other paper by the land department—as distinguished from paying the purchase price or other compliance with the law—that vests such title; and while it is customary that some such certificate or receipt of the land department issue, where the party has paid the full purchase price, or otherwise fully comply with the law, yet the issuance of such a certificate or receipt does not *pass* the equitable title. It is only a convenient *evidence* that such title *has passed.* It is the *act of the party* in full compliance with the act of Congress, and not the *act of the land officers* that *passes* the equitable title.

The decisions are all to this effect. The true doctrine is correctly stated by this court in the case of Benson M. & S. Co. *v.* Alta. M. & S. Co., 145 U. S., 128:

> " It is a general rule in respect to the sale of real property that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser; and this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the land department of the government, *and the rule has been uniform, that whenever in cash sales the price has been paid, or in other cases all the conditions of entry performed, the full equitable title* HAS PASSED, and only the naked legal title remains in the government in trust for the other party in whom is vested all the rights and obligations of ownership."

To the same effect see:

Simons *v.* Wagner, 101 U. S., 261;
United States *v.* Hughes, 11 Howard, 568;
Stark *v.* Starrs, 6 Wallace, 414;
Worth *v.* Branson, 98 U. S., 118;
Carroll *v.* Safford, 3 Howard, 414;
Witherspoon *v.* Duncan, 4 Wallace, 210;
Deffeback *v.* Hawke, 115 U. S., 392;
Colorado Coal & Iron Co. *v.* U. S., 123, U. S., 307;
Davis *v.* Wiebold, 139 U. S., 524.

As applicable to this particular statute—the fact that the equitable rights of a selector depend entirely upon his compliance with the law, and not upon any action of the land department, could not be more clearly stated than is done in the case of McDonald, 30 L. D., 124, where it is said:

> "By his deed of relinquishment and reconveyance to the United States of his own lands, situated within the boundaries of a forest reservation, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, *thereby converting the mere offer or proposal of the government into a contract fully executed upon his part*, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by its act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired."

The case of Clarke *v.* Northern Pacific R. R., 30 L. D., 145, is to the same effect. There the Secretary of the Interior says:

> "If the land selected by Clarke was subject to selection at the time he made selection thereof, and if, as appears to have been the case, the lands embraced in his deeds of relinquishment and deed of conveyance were proper bases for his selection, *he acquired at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands.*"

We have not been able to find a single decision, either of the department or of the courts, sustaining counsel's view that the equitable title does not vest until the department has decided that it has vested.

In Hussman *v.* Durham, 165 U. S., 144, 148, it is clearly pointed out that the equitable title to public land passes not by virtue of any certificate or receipt issued by the land department, but by virtue of the applicant paying the purchase price thereof.

The case holds that land is subject to State taxation whenever the complete equitable title has passed from the United States, but holds that the location of a forged bounty land warrant (although the equivalent of a final receipt) passed no title, but that the equitable title passed by the later payment of the purchase price authorized by act of Congress.

The court says :

> "In other words, the United States does not part with its rights *until it has actually received payment,* and if by mistake, inadvertence, or fraud, a certificate of location (which is the equivalent of a receipt) is issued, *when in fact no consideration has been received, no equitable title is passed thereby;* and a conveyance of the legal title does not operate by relation, back of the time *when the actual consideration was paid.*"

In Carter *v.* Ruddy, 164 U. S., 495, it was held that the certificate of the officers of the land department was only "evidence" of an equitable title; making it clear that the certificate itself does not *pass* the equitable title, but is only a convenient evidence thereof.

Departmental Approval is Not Only Not a Pre-Requisite to the Vesting of Equitable Title, but Equitable Title Frequently Vests in the Very Face of Departmental Disapproval.

Not only is departmental approval unnecessary to the vesting of equitable title in a party who has done all that the law requires of him, to obtain title to a tract of land; but the decisions of this court are numerous to the effect, that equitable title may, and frequently does, vest in a party, not only *without* departmental approval, but in the very face of departmental disapproval. Such was the case of Ard *v.* Brandon, 156 U. S., 537. There a party had fully complied with the provisions of the homestead law, and had offered his final proof, which was rejected, and his entry was erroneously rejected by the local land officers, by the Commissioner of the General Land Office, and by the Secretary of the Interior, and patent erroneously issued to the railroad company, upon which ejectment was brought against the homestead claimant; this court, speaking through Mr. Justice Brewer, said:

> "The question, therefore, is whether the case discloses equitable rights in the defendant superior to the claims of the railroad company. * * * He, [the defendant] had a right to enter the land as a homestead; he pursued the course of procedure prescribed by the statute; he made a formal application for the entry and tendered the requisite fees, and the application was rejected by the officer charged with the duty of receiving them—and wrongfully rejected by him. Such wrongful rejection did not operate to deprive the defendant of his equitable rights."

Consequently, the court held that the equitable title of the defendant—the homesteader—who had fully complied with the homestead law, was superior to the title of the party claiming under the patent to the railroad company; and this, notwithstanding that every branch of the land department, from the Register and Receiver to the Secretary of the Interior, had rejected the homesteader's title and decided against his claim. To the same effect see: Cunningham *v.* Ashley, 14 How., 377; Samson *v.* Smiley, 13 Wal., 91; Duluth *v.* Roy, 173 U. S., 587; Morrison *v.* Stalnaker, 104 U. S., 213, and the recent case of Nelson *v.* Northern Pacific R. R. Co., decided by this court in January of this year; in all of which cases the equitable title of parties was sustained even in the face of departmental disapproval of such title, and as against parties claiming under patents purporting to convey the legal title.

These cases are all fatal to appellees' contention, that equitable title does not vest by the acts of the parties, in doing all that the statute requires of them; and fatal to their contention that equitable title never vests until the department has, by its approval, decided that equitable title has vested.

The numberless cases decided by this court, in which it has been held that a party to whom patent should have issued, may maintain a suit in equity against the party to whom patent has issued by mistake of law in the land department, to have the latter declared a trustee of the legal title for the former, are all authorities fatal to appellees' contention, that equitable title never vests without the approval of the land department; as all of such cases fully sustain our position that when one does *all that the law requires of him* to acquire title to a piece of land, he thereby, in the eyes of equity, becomes the owner of such land, regardless of departmental approval or disapproval.

Here We Have the Certificate of Approval of That Branch of the Department Whose Certificates or Receipts are Sufficient in Homestead or Pre-emption Cases to Sustain Ejectment.

It will be noticed that counsel for appellees are unable to satisfy themselves as to just what branch of the land department is to give the approval upon which they lay so much stress, but content themselves with the general statement that *some* adjudication of the selection by the land department is necessary to vest the title.

It has been the uniform ruling of the land department and the courts, that the certificate of the local land officers vests the equitable title for all the purposes of ownership, taxation, conveyance, dower, decent, ejectment suits, etc.; but counsel for appellees protest that this particular instance is an exception, and that there must be an adjudication by some higher authority, but do not attempt to say whether that authority is the Commissioner, or the Secretary, or both.

In the selections here, not only did the selector do everything that was required of him by law, but the local officers gave their certificate that the land selected "is free from conflict, and there is no adverse filing, entry or claim thereto," and forwarded such selections to the General Land Office for patenting.

It thus appears, that even if some action of the land department is required, as evidence that the equitable title has vested, this position does not help appellees here, as the action of the local land officers allowing the selectors selections, and regularly entering the same on their books, and their issuance of the certificate referred to, constitutes such evidence and approval.

Appellees' Claim that Continuing Jurisdiction in the Department, to Enquire as to Whether or Not Equitable Title Has Vested, is Incompatible With Such Title Having in Fact Vested.

The first ten pages of the reply brief of appellees is devoted to showing that the appellant is trying to sustain two positions in this controversy, which are absolutely incompatible with each other.

It is said that we cannot in one breath claim that the complete equitable title has vested in the selector under the act of June 4, 1897, whenever he has accepted, and fully complied with the offer of exchange of properties contained in such act, and yet in the next breath admit that the department still has jurisdiction—in the exercise of its supervisory power, when that power is properly invoked in a contest regularly initiated under the rules of practice—to inquire into the questions, which go to the validity of such selection. Counsel in effect claim, that until the department has lost all jurisdiction over a selection, that the equitable title to the selected land cannot have passed. This position is unsound and wholly without precedent. The decisions are uniform—in cases where patent is called for by the statute—that the land department does not lose jurisdiction until patent issues; that is, until the *legal* title has passed out of the Government; and to hold that the equstable title cannot pass until the land department loses jurisdiction, is in effect, to hold that the equitable title cannot pass until the *legal* title passes.

The true doctrine as to the continuing supervisory jurisdiction in the department after the equitable title has vested is correctly stated by this court in Michigan Lumber Co. *v.* Rust, 168 U. S., 594, as follows:

> "It is, of course, not pretended that *when the equitable title has passed* the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after the proper notice to the party claiming such equitable title, upon a hearing, to determine the question as to whether or not such title has passed."

And in Cornelius *v.* Kessel, 128 U. S., 426, this court, in referring to the supervisory power of the land department over public lands, said:

> "But the power of supervision and correction is not an unlimited or an arbitrary power, and can be exerted only when the entry is made upon false testimony or without the authority of law. *It cannot be exercised so as to deprive any person of land lawfully entered and paid for; by such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by an order of the Commissioner than he can be deprived by such order of any other lawfully acquired property.*"

See also Wright *v.* Roseberry, 121 U. S., 488, where the decision of the lower court was reversed, for thereas on that it made

> "*the investiture of the title depend upon the act of the Commissioner, instead of the act of Congress;* whereas the certificate of that officer, when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated and of the completeness of their segregation. * * * If they are proved to have been such lands at that date, they were not afterwards subject to pre-emption by settlers. They were not afterwards public lands at the disposal of the United States."

In the recent case of Guaranty Savings Bank *v.* Bladow, 176 U. S., 448, Mr. Justice Peckham, speaking for this court, in referring to the continuing jurisdiction in the land department until patent issues, to inquire into the regularity of all entries of public land, makes it perfectly clear that this is not an arbitrary jurisdiction that can be exercised without a hearing, although such jurisdiction does exist after the equitable title has vested. He says:

> "If the entry were cancelled arbitrarily and without evidence, or notice to him [the entryman] it would not conclude him, and he would, notwithstanding the decision, have the right to show *that his entry was valid and that he was entitled to a patent.*"

Take the innumerable cases decided by the land department, where it has been held that after final proof and payment, and final entry in homestead and pre-emption cases—which acts admittedly vest the equitable title—the department still has jurisdiction, in a proper proceeding, to inquire into the mineral character of the land involved, but that such inquiry when made, will be confined to mineral *known to exist on the land at the time final proof and payment were made, but will exclude all subsequent discoveries of mineral.* These very cases—and there are hundreds of them—all show that continuing supervisory jurisdiction in the land department, to make inquiry of the character mentioned, is in nowise incompatible with the equitable title having in fact already vested. Such jurisdiction, however, will not be exercised where it is admitted that the mineral discovery was made subsequent to the time when the pre-emption or homestead claimant had fully complied with the law. And so in these cases, upon the facts as stated by the bills, and admitted by the demurrers, the land department will not exercise its jurisdiction to make inquiry, for under such a state of facts such jurisdiction could not be invoked.

What is meant in our opening brief, by the statement that jurisdiction remains in the land department after a selection is made, to inquire into the validity of such selection, was merely, that jurisdiction remained until patent issued, to redeem a case from fraud or non-compliance with law; that is to say, that supervisory power is possessed by the department, when properly invoked, to hear any accusations as to false testimony before the register and receiver, or as to the entry being unauthorized by law.

In the records in these two cases, however, there is no question raised by any form of procedure which invokes this supervisory power or justifies its exercise; and our position is not affected by the fact that a case *might be presented* in which the Secretary might have power to reject a selection for non-compliance with the law. Such is not this case, as the demurrers admit facts which preclude the secretary from lawfully rejecting these selections, even in a proceeding properly initiated to that end.

Appellees' Claim That a Selector or Purchaser of Public Lands Has Never "Done All That is Required of Him" by the Law, Until He Has Done "Whatever May Express the Approval of the Land Department as a Part of Those Things Which He Has to Do."

On pages 13 to 16 of appellees' reply brief, counsel for appellees reviews the cases of Carroll *v.* Safford, 3 Howard, 441, 461; French *v.* Spencer, 21 Howard, 328; Witherspoon *v.* Duncan, 98 U. S., 656; Stark *v.* Starrs, 6 Wall., 402; Barney *v.* Dolph, 97 U. S., 652; Worth *v.* Branson, 98 U. S., 118; Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S., 428: all of which hold that equitable title vests, whenever the purchaser has paid the full purchase price, *or otherwise done all that the law requires of him.*

Realizing that these decisions are fatal to appellees' contention, unless it can be made to appear that the departmental approval is "a part of those things which he [the selector] has to do," counsel for appellees, on page 16 of their reply brief, after analyzing the above cases, expresses his conclusion in the following language, namely:

> "But we again respectfully submit that there is not a single case cited upon this subject, or in support of this proposition, in which it does not distinctly appear that the meaning of the phrase 'has done all that is required of him' includes the payment, where payment is required, or a final entry, in other cases, OR WHATEVER ELSE MAY EXPRESS THE APPROVAL OF THE LAND DEPARTMENT AS A PART OF THOSE THINGS WHICH HE HAS TO DO."

Nothing could more clearly show the error into which counsel for appellees has fallen than this statement, as it shows that counsel recognizes that when "a party has done all that is required of him" the equitable title vests, but counsel contends that before a party "has done all that is required of him" he must not only have paid the purchase price, and made his final entry, but he must also have done "WHATEVER ELSE MAY EXPRESS THE APPROVAL OF THE LAND DEPARTMENT AS A PART OF THOSE THINGS WHICH HE HAS TO DO."

Whereas, the thing which expresses the approval of the land department is some certificate, or receipt, or decision of officers of that department, none of which are parts "of those things which he [the purchaser or entryman] has to do," or by any possibility could do.

It is only, however, by encumbering the purchaser or entryman with the duty of performing these official acts of departmental officers, that counsel can claim that the de

partmental final approval is a condition precedent to the vesting of the equitable title; and it shows the extent to which our adversaries are driven by the decisions, for them to hold that an applicant for title to public land, must not only *do whatever the statute exacts of him*, but that he must also *do the acts which the law devolves upon the officials of the land department, and which such officials alone can do.*

In other words, he must not only fully comply with the law, but he must also officially—for the land department—decide and determine that he has fully complied with the law, and must issue some official certificate or official receipt of approval on behalf of the land department. That is, he must usurp the functions of the Secretary of the Interior, and sign the Secretary's name to a patent certificate.

A position which leads to such absurdities, requires no argument to refute.

Appellees' Claim That a Relinquishment of Forest Reserve Lands to the United States Cannot Be Considered "Payment" for the Selected Land Nor a "Delivery" of a Deed for the Relinquished Land.

On page 18 of appellees' reply brief it is claimed that equitable title does not vest in the selector, under the act of June 4, 1897, by virtue of his relinquishment of forest reserve land and the selection of lieu land authorized by the statute; and as reasons therefor, it is stated that the relinquishment neither operates as "payment" for the selected land, nor as a technical "delivery" of the deed for the relinquished land, as there can be no delivery, prior to acceptance, and there can be no acceptance until the departmental final approval of the selection is had.

In answer to this argument, we claim that it is wholly immaterial whether the relinquishment be considered tech-

nical "payment" for the land, or whether it is a technical "delivery" of the deed, or as to whether there can be a technical "delivery" of the deed prior to a technical acceptance thereof, or as to when the technical acceptance takes place. The only question we have to consider is: Has the selector "done everything required of him by the statute?" If so, the title to the selected land is his in equity, whether what he has done constitutes technical "payment" or technical "delivery" of the deed or not.

In determining whether equitable title has vested or not, the only criterion is: Has the entryman done everything required of him by the statute? If so, the equitable title to the land is his. The *statute* requires but *two* things of a selector under the act of June 4, 1897, namely, relinquishment and selection. When these are completed, the selector has done all that the statute exacts of him, and it is wholly immaterial whether his relinquishment is technical "payment," or as to whether it constitute sa technical "delivery" of the deed; as there is no provision of the statute requiring him to make technical "payment" or technical "delivery" of the deed, but merely to RELINQUISH and to SELECT.

The selector's right to a patent is secured by his tender of the relinquishment, and his declaration of selection, provided title to the base land be good, the relinquishment effective, and the land selected of the class prescribed by the act.

Equitable title vests at the date of selection, under the act of June 4, 1897, whether the selector's relinquishment of his forest reserve land be contemporaneous with his selection—as the act of Congress contemplates—or prior thereto, as made necessary by land office regulations.

We claim that the act of June 4, 1897, is an offer of *contemporaneous* exchange of properties, in which the selector should not be required to relinquish his forest reserve land in advance of his selection of the lieu lands offered him by the Government; and we insist that the selector is entitled to know at the very time of making his relinquishment what specific lands he is to get in exchange for his relinquished lands; and we hold that this offer of exchange contemplated not that owners of forest reserve land should trade "sight unseen," or by "a pig in a poke," or get a floating right to select *some* vacant land open to settlement *somewhere*, but that they might be, and would be influenced, guided, and even controlled in making their relinquishments by a knowledge of, and the certainty of obtaining the specific lands they were to get in lieu thereof. As said by the Circuit Court for the Ninth Circuit in Olive Land and Development Co. *v.* Olmstead, 103 Fed., 568:

> "In all cases the land authorized to be selected in lieu of that relinquished is required to be vacant and open to settlement. When? Manifestly at the date of selection. *It is upon its then character and condition that the selector has the right and is bound to act. Before making his selection he must inform himself of the character and condition of the tracts desired;* but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future."

This clearly shows that the relinquishments and selections contemplated are contemporaneous; but, say our adversaries—both upon the oral argument and in the briefs—this view, and the conclusions drawn from it, must fail, for the reason that, in the practical administration of this act by the land department, the relinquishments to the Government are in advance of the selections, and hence, not being contemporaneous, the equitable title does not vest at the date of selection, as we claim.

This argument is not sound. The rights of a purchaser, while they may not be any better by the payment of the purchase price in advance, are certainly no worse than by his contemporaneous payment. We do not claim that the equitable title vests at the date of the relinquishment, if the relinquishment precedes the selection, but that both relinquishment and selection are required to constitute compliance with the statutory offer of exchange, and until both acts are completed the exchange is not completed, and it is only then that the equitable title vests.

When both acts called for by the statute are consummated, however, certainly the completion of the exchange is not deferred, nor the vesting of the equitable title postponed, because the selector, by his prior relinquishment, has been compelled to pay the purchase or exchange price in advance. In the merchantile world, generally, advance payment of purchase price, instead of being a detriment to the purchaser, is accounted an advantage which usually entitles him to a discount in price; and, while we are not contending for any such advantage by prepayment here, certainly a selector's rights are not thereby prejudiced.

The Departmental Regulations Alone Responsible for Relinquishments in Advance of Selections.

By rule 16 of the regulations of the land department under the act of June 4, 1897, it is provided, as follows:

> "16. Where final certificate or patent has issued it will be necessary for the entryman or owner thereunder to execute a quit claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title duly authenticated showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for."

See 24 L. D., pages 592, 593.

It will thus be seen that the department requires one having the perfect title to lands in a forest reserve, to divest himself of such title by a relinquishment placed of record in the county recorder's office, before he is permitted to make his selection in lieu thereof. The placing of the selector's deed of record vests the legal title to the relinquished land in the United States beyond the selector's power of recall; and it is only by an act of Congress that such title can be re-obtained.

Under this regulation of the department a selector is required to part absolutely with the entire consideration for the selected land—that is to pay in advance the full purchase or exchange price—before he can be allowed to make the selection authorized by the statute.

The department has thus closed the door to the contemporaneous exchange of properties contemplated by the statute, and made it absolutely necessary that the owner of forest reserve lands should relinquish such lands to the Government before making his selection of lieu land.

Under the Department's administration of this act, a selector may pick out a particular piece of land which he wishes to select, and may with all haste, send his deed of his relinquished land for record in the proper county, and order his abstract of title brought down showing that he has conveyed a good title to the Government, and yet before he can get back such deed, and abstract of title, and deliver the same to the local land office, and select the tract which he had chosen in his own mind in lieu thereof, such tract may have been selected by some one else, and the real inducement to the transfer may be thus lost, without any fault of the selector.

Because the department by this arbitrary rule has defeated *pro tanto* the efficiency of the act, and rendered contemporaneous relinquishments and selections impossible, certainly a selector's rights—after he has made a

selection of land—should not be prejudiced or postponed because of this departmental exaction. Recognizing the hardships of this rule, the department for a long time and until March 6, 1900 (see instructions 29 L. D., 578), permitted owners of forest reserve lands to convey such lands to the Government in large tracts, and to place the deed therefor of record, and furnish an abstract of title therefor, and deliver the same to some local land office, and thereafter to select, from time to time, lands in lieu of designated portions thereof, each selection referring to the deed of relinquishment and abstract of title theretofore furnished to the Government. By this means, although the owner of forest reserve lands was required to relinquish his lands in advance of his right of selection of lieu lands, yet he was thereby enabled to hunt up lands he wished to select as lieu lands, and after finding the same, he could select at once, without losing time in sending his deed of relinquishment for record and getting an abstract of title, and running the risk of losing the desired land by having some one take it in the meantime.

This exaction of the land department compelling relinquishments to precede selections, contrary to the requirements of the statute, certainly cannot be urged as a ground of postponing the taking effect of selections, when once made, or as a reason why the selector's title should be exposed to attacks by third persons, or endangered by subsequent mineral discoveries.

The rule of the department requiring all relinquishments to be placed of record in the office of the county recorder of the county in which the relinquished land is located estops the land department from claiming that there has been no delivery of the deed until the department's approval thereof.

Placing the deed of record as directed by the above quoted departmental regulation, operates to vest the legal

title of record in the United States, whether the selector ever makes selection of lieu lands or not; and only an act of Congress can revest such title in the grantor, and it certainly does not lie in the mouth of the department to say that there has been no delivery of a deed—the legal effect of recording, which has transfered the record title to the United States—such recording having been done under a mandatory departmental regulation.

It was said by Mr. Chapman in the oral argument, that as there is power in the department to *accept* deeds of relinquishment to the United States, the department must have power to *reconvey* such title, if need be. The department, however, in the case of Tevis, 29 L. D., 275-77, held otherwise in the following language:

> "There is no statute under which title so relinquished or reconveyed to the Government can be returned or restored to the party making the relinquishment or reconveyance; that is to say, such a contingency or situation is wholly unprovided for in the existing legislation."

And yet the department exacts relinquishments of record in advance of selections, thus exposing a selector to the possible loss of the only tract of land for which he would have willingly traded his forest reserve land.

Appellees' Argument that because a Homesteader's Right may be lost by a Discovery of Mineral BEFORE he has fully complied with the Law, our rights should be lost by a Mineral Discovery AFTER we have fully complied with the Law.

Many attempts have been made by counsel for appellees to show that even if a selector, under the act of June 4, 1897, should lose his selected lands on account of a subse-

quent mineral discovery thereon, he is no worse off than the homesteader who has resided on his homestead for four years, eleven months and twenty-nine days, and who loses such homestead and the improvements thereon because valuable mineral deposits were found thereon twenty-four hours before the expiration of his five years residence required by the law, and before he had made his final proof as required by the law.

While we do not believe that this court will ever sanction such an injustice when such a case is squarely presented for its consideration,—although there are land office decisions which would seem to point to such conclusion,—yet, if it did, it would do so upon the ground that the *statute* requires the five years residence, and also requires the making of the final proof by the homesteader, before he is entitled to a patent; and that until both of these things have been done he has not "done all things required of him by the statute," and for this reason he has not acquired the complete equitable title and, therefore, his homestead is subject to be defeated by mineral discoveries made at any time before he has completely earned his patent under the statute. Such reasoning, however, would be wholly inapplicable to a selection under the act of June 4, 1897, where the selector, by making both the relinquishment and selection called for by the act, *has done everything* required of him by the statute.

But, as said above, we do not believe that this court will ever visit any such hardship as above mentioned on a homesteader, even though he may not have completed his statutory residence and made his final proof, when mineral is discovered on his land; for we believe it will be held that by his original homestead entry and, by his part performance of his obligation under the homestead law, he has acquired such an equity in the land as will protect him against the acquisition therein of any mineral rights by

others; as a homestead of record legally appropriates the land and mineral claims can only be lawfully initiated upon *unappropriated* public lands.

We think there are good grounds for holding that the original homestead entry under the statute amounts to a grant upon condition subsequent, as the statute, section 2397, provides, that for a failure of the homesteader to comply with the law "the land so entered *shall revert to the Government*," thus indicating that title had passed, otherwise, there would be nothing to *revert*.

Our discussion of this subject, however, is purely academic, no such holding being required to sustain our position here, as our contract of exchange is fully executed on our part as soon as we have made the relinquishment and selection called for by the statute.

The Term "Final Entry," as Distinguished from "Original Entry," is only applicable where Title is acquired by Progressive Steps; and has no Application where the Original Entry Operates as an Immediate Consummated Purchase.

Counsel for appellees has said many times in the course of his briefs in these cases, that appellants' grantors acquired no equitable title by virtue of their compliance with the provisions of the act of June 4, 1897, because they made no "*final* entry," even though they had done everything required of them by the statute. But we submit that there is no magic in the term "*final entry*." It is only used to distinguish between the *first* and the *last* entry made by parties under laws which provide for the acquisition of title by progressive steps, such as are followed under the homestead, preemption, timber culture, desert land and other similar laws.

It has no application whatsoever to an entry which amounts to an immediate consummated purchase, at the time of the original entry.

As stated in our opening brief, a selection under the act of June 4, 1897, is the legal equivalent of a private cash entry, of land offered for sale, and differs only from an ordinary cash entry, or land warrant or scrip location, *in the character of the consideration given*, namely, land conveyed at the time of entry, or—as the department exacts—in advance of entry, instead of money, land warrant, or scrip delivered at the time of the entry. This being so, such selections are governed by the same rules of law applicable to cash entries, and bounty land warrant and scrip locations, all of which have been held to vest equitable title at the time the original entries are made in the local land office, although the department still retains supervisory jurisdiction, to determine as to whether or not the lands entered were subject to such entry, as to whether or not the consideration offered was genuine, and as to the entryman's ownership of such warrants or scrip ; but it has never been held that the entryman's equitable title to the entered land was held in suspense or open to the attack of others during the period of time consumed by the department in making these inquiries. See Laraviere *v.* Madegan, 1 Dillon, 457; French *v.* Spencer, 62 U. S., 228; Culver *v.* Uthe, 133 U. S., 655.

In such cases there is but *one* entry and it is both an "original" and a "final" entry, in the sense that it includes all that the entryman has to do to complete his title ; and the same is true of selections under the act of June 4, 1897.

The Exchange authorized by the act of June 4, 1897, is a Substitute for Condemnation Proceedings.

The statute of June 4, 1897, is a special one designed to accomplish the single purpose of relieving forest reserves

of private titles therein. This object might have been accomplished under the law of eminent domain, by means of which the Government could by condemnation have acquired the title to the land relinquished, and have paid therefor in money. To suit the convenience of the Government, however, the law of June 4, 1897, was enacted at the suggestion of the Department of the Interior, and was declared by that department to be certain, unambiguous, and without difficulty of construction. It provides that a person owning land in a forest reserve covered by a patent, may swap it for land outside of the forest reserve.

This transaction does not involve judicial of quasi-judicial power at all. It is as lacking in complications as swapping horses. The owners of two animals meet on the highway and exchange one for the other and depart in peace. The owners of two pieces of land under this statute, meet upon the highway of this statute, and exchange lands, and are supposed to depart in peace. In such an exchange of properties the Government and the selector are each vendor and vendee at the same time. The title to the one piece of land is the consideration for the title to the other piece. The distinction between a sale and an exchange is rather one of shadow than of substance. In both cases, the title is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration is money or a commodity. Commonwealth *v.* Clark, 14 Gray, 472, Biglow, Judge. For a fuller discussion of this subject, see pages 9 to 16 and 33 to 38, opening brief of plaintiff in error in case No. 632, the mandamus case argued herewith, in that part of such brief which was printed for use before the Court of Appeals, and bound with and made a part of the opening brief of plaintiff in error in this court.

The alleged Distinctions between the Present Cases and the Case of Olive L. & D. Co. v. Olmstead, 103 Fed., 568.

On pages 22 and 23 of appellees' reply brief—in attempting to justify Judge Ross in having reached conclusions in

the present cases, the very opposite of those announced by him in the case of Olive L. & D. Co., *v.* Olmstead (103 Fed. 568)—it is stated that—

> "Judge Ross himself has *shown* that the opinion in the latter [Olive] case was based upon a misunderstanding of the facts applicable to that case, etc."

While Judge Ross has *attempted* to show certain distinctions between these cases and the Olive case, and to show a misunderstanding of certain factors which he claims affected his judgment in the former case, yet we respectfully submit that none of the alleged distinctions or misunderstandings are in law of any consequence whatsoever, and that they in no wise justified his complete change of views in the present cases, as we have clearly shown in our opening brief (pages 167 to 180, 190 to 199), to which we invite the court's attention in reply to counsel's argument on this subject.

The Defendants in these Cases cannot Contest with Complainants the Legal Efficacy of the Record made up between Complainants' Predecessors and the Government of the United States.

Without in anywise abating our claim that complainant's equitable title to the land in controversy was perfect and complete as against the Government and all parties in privity with it, both by virtue of the record made up in the land department, and the facts alleged in the bill independent of the record, yet for the purposes of this appeal and as against the defendants who are mere trespassers, we can stand upon the record alone as made up in the land department. The defendants here are charged as trespassers with violently entering upon the land in controversy after the certificate of selection had been issued by the local land officers, and

with committing waste upon the selected property without any right whatever thereto; and as the defendants have by demurrer admitted the facts charged against them, they cannot argue that the record made up between the Government of the United States and complainant's grantors—because of the absence of an *ex parte* affidavit—is not entitled to the legal significance, and to the presumptions of law as to its correctness, usually attaching to such records. Defendants' argument is confined to the alleged weakness of the plaintiff's title to the property in controversy. The proper local agencies of the United States having accepted, made record entry of, and approved such selection, the alleged weakness of the same, as between the United States and the selector, cannot be raised upon demurrer by these defendants, who are mere trespassers. The United States deals directly with its grantees and not through third persons. A third person, who is a mere trespasser, cannot upon demurrer invoke the weakness of an entry or selection of public land made by another, nor can a third person call upon that other to establish or defend his selection. N. P. R. Co. *v.* Saunders, 166 U. S., 631; Sioux City *v.* Griffith, 143 U. S., 32; Lizzie Bergen, 30 L. D., 266.

The defendants, as mere protestants, have no standing in court to argue against the strength of complainant's title. Wight *v.* DuBois' 21 Fed., 694.

The Government of the United States is dealing directly with complainants, and not indirectly through defendants as protestants. The Government may waive as against itself any irregularity in the proceedings of complainants' grantor, and, if there was any, did so by accepting his selections and certifying to the same. Barnard *v.* Ashley, 18 Howard, 43.

The defendants cannot on demurrer litigate the strength or weakness of any papers issued by the Government to the complainants' grantor in this case. This court will not,

in a case between complainants and defendants on demurrer, hold that the record and certificate of selection issued to complainants' grantor are not what they purport to be on their face. Defendants in no aspect of this case are connected with the title through the Government, or by independent equity, and are therefore in no position to discuss the legal effect of the papers issued by the Government to plaintiffs' grantors. But, as we have already shown, it would be of no consequence if they could, as the bills state facts showing complainants to be the owners of the complete equitable title against all the world, including the Government and all who might in privity with it.

The Harrell & Culver Cases.

In the case of A. J. Harrell, 29 L. D., 553, referred to by our opponents in their main brief as holding that a selector's rights under the act of June 4, 1897, are fixed at the time of the approval of his selection by the Commissioner, is not a holding that the selector's rights *were not fixed prior to the Commissioner's approval.* The department was not called upon in that case to pass upon the character of rights acquired prior to the Commissioner's approval, for the reason that such approval had already been had in that case prior to the happening of the occurrence which it was claimed adversely affected the selector's rights; and it was sufficient to say in that case that the selector's rights could not be affected by anything occurring after the approval of the selection. When the department was called upon later to determine the character of a selector's rights acquired *before* the Commissioner's approval, it held, in the McDonald and Clarke cases above cited, that the selector's rights became fixed and vested, and the contract of exchange wholly executed by him, whenever he had made his relinquishment and selection as required by the statute.

The case of United States *v.* Culver, 52 Fed., 81, is

principally relied upon by defendants as supporting their view that the *belief* of a non-mineral claimant as to the mineral character of land affects the right of such claimant to make entry of the land.

We call the court's attention to the fact that in such case it is expressly stated that the land, as to which the patent was set aside, *was known to be mineral at the time the original homestead entry was made.* Counsel's argument in relation to this case seems to be based upon the statement also contained in this decision, that mining experts had expressed the opinion that the land was mineral. This, however, does not weaken the further statement that the land was *known* to be mineral. If the court intended to go as far as our adversaries claim it did, then the case is badly decided, and is squarely in conflict with the express views of this court in I. S. M. Company *v.* Reynolds, 124 U. S., 374; Sullivan *v.* I. S. M. Co., 143 Id., 431; Colorado Coal Co. *v.* U. S., 123 U. S., 307; Deffebach *v.* Hawke, 115 U. S., 399; Davis *v.* Wiebold, 139 U. S., 507; of Judge Ross, in the Olive L. & D. Co., case 103 Fed., 578.

If the court in the Culver case was influenced in its decision by the fact that it was apparent that the homesteader acquired the land, not for homestead purposes but for its mineral value, its judgment might be reconciled with the homestead statute, section 2390, which requires the homesteader to make affidavit that "his entry is made for the purpose of actual settlement and cultivation."

The purpose or motive of the homesteader in making homestead entry being thus made by statute an element in his right of entry, it was not improper for the court to take such purpose into consideration in the Culver case; but we have shown that the purpose of a selector under the act of June 4, 1897, in making his selection is not an element in his right of selection and is wholly immaterial. See pages

25 to 27 appellant's opening brief, and Olive L. & D. Co. *v.* Olmstead, 103 Federal, 568.

The bill presents a proper case for quieting title and removing the cloud of the alleged mining claims.

In our opening brief (pages 200-222), we show that there is no question as to the jurisdiction of the Federal Equity Courts—at the instance of one claiming to be the equitable owner, by receiver and injunction—to preserve real property from trespass and waste, pending proceedings in the land department to acquire the legal title; and we further maintained that such court having acquired jurisdiction for that purpose—as there was no remedy at law—would go further, and also quiet the owners equitable title and right of possession. Counsel for appellees admits that if we have the equitable title, that the Federal Courts of Equity have jurisdiction to protect the property from waste and spoliation.

Assuming that the bill shows a complete equitable title in the complainant, the objection is raised that, as the complainant was out of possession, it must first obtain the legal title and then have its remedy by ejectment, a principle still recognized by the federal courts, though the weight of State authority supports the jurisdiction of equity in such case.

> See Title, Quieting Title in Enc. of Pleading and Practice.

We reply—

First. That, as the complainant could not compel the United States to convey the legal title, there was no adequate means of procuring such title, and the reason of the rule ceases.

This principle was recognized by the court in *Frost v. Spitley* (121 U. S. 552), where Mr. Justice Gray, speaking for the court, said:

> "It is possible that one who holds land under grant from the United States, who has done everything in his power to entitle him to a patent (which he cannot compel the United States to issue him), and is deemed the legal owner so far as to render the land taxable to him by the State in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his title and possession."

Counsel for defendants contend that mandamus against the officers of the land department to compel the issuance of patent will not lie in any case, but mandamus, even when it will lie in proper cases, is not a plain and adequate relief to the individual within the rule of equity.

The prohibition in the federal statute, R. S. 723, is merely that suits in equity shall not be maintained "where plain, adequate, and complete remedy may be had at law," and, as said by Mr. Justice Harlan in *Rich v. Braxton* (158 U. S., 375, 406):

> "It must be remembered that 'it is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, *as proper and efficient to the ends of justice and its prompt administration as the remedy in equity. Boyce v. Grundy*, 3 Pet., 210, 215; *Drexel v. Berney*, 122 U. S., 241, 252: *Allen v. Hanks*, 136 U. S., 300, 311. And the application of the rule depends upon the circumstances of each case, Watson *v.* Sutherland, 5 Wall., 74, 79."

Mandamus is a prerogative writ, issuing in the name of the sovereign, and is governed, not by the right of the individual wronged, but by the duty of the officer, and many considerations which do not affect the right of the

individual, and in many cases it has been refused when the court was forced to regret its lack of jurisdiction to grant relief.

On the other hand, the remedy in equity is peculiarly appropriate here, because the defendants had sought to cloud the title of the complainant in the land department and incite an attach upon it by the Government. While, upon the facts alleged in the bill, such an attack would be entirely unwarranted, yet the action of the defendants tended to delay and embarrass, and as now appears, has in one of these cases actually prevented the procurement of patent through the land department, and, if the objection now raised to the relief sought in equity could be sustained the defendants would be profiting by their own wrong.

Again, by operation of the forest lieu land acts of June 4, 1897, upon the facts alleged in the bill, complete exchange of titles was effected and the selector became the owner of the selected land to all intents and for all purposes, except the single one of maintaining ejectment at law. The complainant, his grantee, was entitled to the possession and enjoyment of the property, but could not sue in ejectment nor use the name of the United States in such suit (Corporation *v.* Young, 10 Wheat., 406; U. S. *v.* Draper, 19 D. C., 91, 93; U. S. *v.* Doughty, 7 Blatch., 424; 15 Enc. Pl. & Pr., 512), nor compel the United States to evict the defendants and put it in possession.

It would be a case of wrong without remedy if a purchaser of land from the United States, who became immediately liable to taxation as owner, should be deprived of the right to recover and enjoy possession, purely and solely by reason of the delay and circumlocution of the land department in issuing patent which, in legal contemplation, is delivered at the time of sale.

The Government does not go on the land, oust trespassers and put its vendees in possession, but throws its

courts open to remedy every wrong. If a plain, speedy, and adequate remedy does not exist at law necessarily it must exist in equity.

As said by this court in Sharon *v.* Tucker (144 U. S., 533), where the same objection was urged as is urged here:

> "Many other authorities to the same purport might be cited. They are only illustrative of the remedies afforded by the courts of equity to remove difficulties in the way of owners of property, using and enjoying it fully, when, from causes beyond their control, such use and enjoyment are obstructed. The form of relief will always be adapted to the obstacles to be removed. The flexibility of decrees of a court of equity will enable it to meet every emergency. Here the embarrassments of the complainants in the use and enjoyment of their property are obvious and insuperable, except by relief through that court."

Again, it is the well settled rule that—

> "When there is any other distinct head of equity jurisdiction sufficient to support the suit, possession by the plaintiff is not required, but equity will retain the cause and grant relief by quieting the title or removing clouds."
>
> (See Title Quieting Title in the Enc. of Pleading and Practice.)

In any event, having obtained jurisdiction for the purpose of injunction and staying waste, the court will grant full relief by quieting the title. This was expressly so held in the recent case of Peck *v.* Ayers & Lord Tie Co. (116 Fed., 273) in the Circuit Court of Appeals for the sixth circuit (May 6, 1902), where the court says (p. 275):

"But we think the bill could be properly entertained as one for restraining the waste and destruction of the property, and incidentally for an accounting for waste already committed. For such a purpose it is not necessary that the plaintiff should be in possession. Indeed the jurisdiction was originally exercised in cases where the defendant was in possession as tenant for years, as trustee, or as owner of a life or other limited estate. Story Eq. Jur. Secs., 915-918). And having obtained jurisdiction for that purpose we think the court might, for the purpose of preventing a multiplicity of suits, retain it for further relief by settling the question of title—a question deeply involved in the determination of the controversy over the right to an injunction to stay waste and requiring similar proofs. *Ober v. Gallagher*, 93 U. S., 199; *Ward v. Todd*, 103 U. S., 327.

The decree of the Circuit Court is objectionable in that it does not accomplish a final result and leaves the complainants without the means of reaching a decree which will finally establish the rights of the parties. The question of title being the principal issue in the case, we think the court should determine it, or, in its discretion, formulate the issue and direct it to be tried on the law side of the court by a jury and, upon verdict being reported into court, or having determined the issue for itself, proceed with the case, according to the course of equity, to a final decree."

The language of this court in Gormley *v.* Clark (134 U. S., 338) is pertinent, especially, in view of the fact that under the laws of California a bill to quiet title will lie on behalf of the owner of the equitable title out of possession. The court says:

"It is strenuously insisted that the remedy at law was adequate, and that as the right of possession was purely a legal question and for a jury, the court of chancery should have declined jurisdiction; but,

inasmuch as the case came within the provisions of the statute, and equity alone could afford the *entire* relief sought, the fact that legal questions were also involved could not oust the court of jurisdiction. *The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances* (*Kilbourn v. Sunderland*, 130 U.S,, 505-514); and it is quite clear that under this statute the *restoration of the record title is a matter essentially of equitable cognizance, while the declaration of the invalidity of the ordinance of January 3, 1882, the removal of the cloud caused by recording a copy thereof, and the abatement of the obstruction to the streets*, were matters in respect to which, under the averments of the petition and the evidence adduced at the hearing, the petitioner could properly resort to a court of equity. Undoubtedly the rule that a bill may be retained for the purpose of granting full relief when jurisdiction exists, should not be abused by being employed as a mere pretext for bringing into chancery causes proper for a court of law; but under the local law, this could not be predicated of a petition which the petitioner was entitled to file under the "Burnt Records Act," *and, as already stated, we administsr, where adverse citizenship gives us jurisdiction of a case, the equitable relief which state legislation accords.*"

But there are as well, other aspects of the bill which present equitable grounds for relief.

In paragraph XIX, in case 217, and in paragraph XIII, in case 218, the bill alleges that the defendants

> "are daily slandering your orator's title, clouding the same and giving out and proclaiming that your orator has no rights in said premises, and by their said conduct the defendants prevent your orator's enjoyment or sale of said property; and threaten that they and their employees will do personal vio-

lence to any one representing your orator who comes upon said premises in any manner to peaceable protect said property from waste, spoliation, or diminution of value by defendants; and your orator verily believes and alleges *that said threats will be executed should your orator or any of its representatives come upon said lands for the purpose of inspecting the same or investigating the actions of the defendants concerning the production and marketing of petroleum therefrom* unless restrained therefrom by this honorable court; that defendants other than said Clarke threaten to, and unless restrained by this court, your orator verily believes and alleges that they will bore other wells upon said premises, and if successful in obtaining petroleum therein, they will take such petroleum therefrom, and market the same for their own use and benefit; that if such excavation, drilling and boring by the said defendants, and their taking from such lands the petroleum product thereof and marketing the same is allowed to continue, *the right so to do will ripen into an easement in said lands and irreparably impair the value of your orator's right, title and interest therein.*"

And in paragraph XX, case 217, and paragraph XIV, case 218, it is alleged—

"That in the community in which the lands described in paragraphs VI and X hereof are located, *angry and violent feelings exist in the minds of the people against all persons seeking or attempting to acquire title to lands in that locality, under the provisions of the act of Congress of June 4, 1897, as aforesaid; and that no one in said community who is in sympathy or in affiliation with those attempting to acquire title to lands in such manner, dare show his sympathy or affiliation, for fear of personal violence and social ostracism being visited upon him;* that so strong is the public feeling in such community against parties attempting to acquire title to land under such act, that parties claiming title to land under the

placer mining laws adversely to those claiming the same lands under the act of Congress of June 4, 1897, have notified the latter that there was no law in the land which could disposses or deprive the said placer claimants of such lands, or establish the title of their adversaries thereto; and that death and bloodshed would follow before any decree of court to that effect could be executed;

* * * * * * * *

and your orator further believes and alleges *that without the protection of this court by means of a receiver in possession of said property, pending this litigation your orator will not be able to go upon said lands or send its representatives thereon, to obtain the necessary evidence to refute any showing that defendants may make* upon an order to show cause why an injunction should not issue restraining defendants pending this suit, from forther boring in or removing oil from the premises in controversy. And your orator believes and alleges that in order to make a temporary *ex parte* restraining order against the defendants in this case effective, and *in order to preserve the existing status of said property, and to preserve the evidence upon which your orator's rights in the premises depend, and to the end that your orator and its representatives may have free access to said property, pending this litigation, to inspect, examine, and investigate the same, so as to show its true condition and all the facts affecting your orator's rights in the premises*, it is necessary that a receiver be appointed by this court at the time of filing suit herein, to take charge of, protect, and preserve the property in controversy, and to see that any restraining order issued by the court be not violated."

All of the cases hold that where a party, through fraud, perjury, or intimidation of his witnesses, has been deprived of a determination in his favor in the land department, he may come into equity for relief; and it is a maxim of equity that what it will relieve against after the injury is

done it will anticipate and prevent by proper proceedings.

And this principle seems to be recognized in the early leading cases in this court. As said in Garland *v.* Wynn (20 How., 6-8):

> "The general rule is, that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the Government, regardless of the rights of the others, the latter may come into the ordinary courts of justice and litigate the conflicting claims. Such was the case of *Comegys v. Vasse*, 1 Pet., 212, and the case before us belongs to the same class of *ex parte* proceedings; nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court.
>
> "It was, in effect, so held in the case of Lytle *v.* The State of Arkansas, 9 How., 328; next, in the case of Cunningham *v.* Ashley, 14 How., 377; and again in the case of Barnard *v.* Ashley, 18 How., 44."

When it is remembered that there was no power to compel witnesses to attend and testify at hearings before the local land officers (Weaks *v.* Cobb, 2 L. D., 223), these allegations of the bill present a clear case for the interposition of equity to preserve the evidence of the character of the land at the time of selection, upon which the validity of the selections would depend in case of an attack upon them by the Government at the instigation of the defendants, and to have the issue as to the character of the land determined in a tribunal where witnesses could be compelled to attend and testify, and the evidence of the title made matter of record.

A case similar to the one at bar in this and other aspects was presented in *Sharon v. Tucker, supra,* where a complainant out of possession held a title which had ripened by adverse possession before the defendant obtained possession, and the bill sought a decree quieting the title (so that it would be a matter of record instead of resting on the testimony of witnesses) and awarding the complainant possession; and this court, because of this ground of equitable relief—the preservation of evidence and making record of the title—reversed the court below and granted the relief prayed, notwithstanding an action of ejectment could have been brought.

In this case the court reviewed the previous cases in this court and demonstrated the distinction between a technical bill to quiet title or a bill of peace and a bill which seeks also the preservation and protection of the evidence upon which title depends. The court, per Field, J., says, in conclusion:

> "The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it matter of record, must justify it upon like proof, to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record."

So here it is essential to the protection of the right and title of the complainant that the court of equity should lend its aid to preserve the evidence of the character of the land at the time of selection against the force and intimidation employed by the defendants and against the contingency of the death or removal of the witnesses, and to relieve the complainant from the embarrassment and danger of an *ex parte* proceeding in the land department where, by reason of such force and intimidation and the state of public feeling in the community, the complainant would not

be able to procure the attendance of the witnesses who were cognizant of the facts and able to testify as to the condition of the lands at the time of selection.

While it is true that the Federal Equity Courts have frequently declined to entertain bills to quiet title where the complainant had only an equitable title, or the defendant was in possession, yet there was nothing in the complainant's equitable title *per se*, or in the defendant's possession *per se*, that repelled the equity jurisdiction; and the reason for the refusal to entertain such bills has always been that there was other more appropriate remedy in equity, or an adequate remedy at law. Where complainant had only the equitable title, the remedy of quieting title was denied him, until by an appropriate suit for specific performance or to compel a conveyance he had acquired the legal title; and when the defendant was in possession it was held that the complainant must first bring an action of ejectment wherein the defendant could have his constitutional right of trial by jury. But the reason of both of these rules fails in the present cases, as a suit against the United States to compel specific performance of its portion of the contract of exchange will not lie, as the United States cannot be sued, and the equitable owner cannot use the name of the legal owner in an action of ejectment or compel the legal owner to evict the party in possession, and hence the only reason given by the Federal Equity Courts for not quieting an equitable title, fails in these cases; and as ejectment against the defendants in possession will not lie based upon complainant's equitable title, the reason for not quieting title against a defendant in possession fails. As it is a maxim of equity, of universal application, that when the reason of the rule fails, the rule itself does not apply, it necessarily follows that the rule above mentioned, that the Federal Equity Courts will not quiet an equitable title, or quiet any title, against a defendant in

possession, has no application here, as there is no speedy, plain, adequate or complete remedy at law—or in fact any other remedy—either at law or in equity.

While the courts of equity decline to pass upon titles pending and under determination in courts of law, the reason of such rule is that such courts of law and equity are of co-ordinate jurisdiction, and the decisions of the law courts, when rendered, are binding and conclusive upon the Courts of Equity. But this reason is utterly lacking in application to the decisions of the land department, as one of the special functions of courts of equity, is to correct erroneous decisions of the land department, to the end that those who are entitled to lands may not be deprived of them by the erroneous or arbitrary ruling of this executive branch of the Government; and the reason for the interference of the equity courts to quiet title and remove a cloud in such a controversy as the present, is emphasized by the fact that here—if the allegations of the complainant's bill are true—complainants have a perfect equitable title to these lands, yet the *legal* title to such land may never issue to either plaintiff or defendant, as plaintiff's title may be erroneously or arbitrarily denied by the land department—as has been done in one of these cases (No. 217) since these suits were brought,—and yet no title may ever issued to defendants, as under the mining laws they may never apply for a patent, but may be entirely satisfied to rest upon their possessory claim, which will permit them to consume the values of these lands, and to continue to cloud plaintiffs' title with impunity, unless the Courts of Equity suit their remedial processes to the necessities of the situation and quiet plaintiffs' title, correct the erroneous holdings of the land department, and restrain defendants' spoliation of the property. If a Court of Equity would, for plaintiff's benefit, hold the defendants as trustees of any legal title

which should issue to them, as it certainly would, its remedial powers are not paralyzed because defendants decline to take out such legal title, so long as they can with impunity enjoy all the benefits of ownership, without exposing themselves to suit, as they are seeking to do here.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

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SUPREME COURT U.S.

THE COSMOS EXPLORATION CO., *Appellant,*
v.
THE GRAY EAGLE OIL CO., *et al.* } No. 217.

THE PACIFIC LAND & IMPROVEMENT CO., *Appellant,*
v.
THE ELWOOD OIL CO., *et al.* } No. 218.

Petition for Modification of the Judgments so as to Direct that the Decrees of Dismissal be Without Prejudice.

Come now, the appellants in the above-entitled causes, by their solicitors, and showing that the ruling of this Court therein does not involve the merits of the cases, but dismisses the appeal solely by reason of the pendency of the proceeding in the Land Department and that the complainant should not be prejudiced or embarrassed in future litigation by a decree of dismissal generally.

Pray that the judgments of affirmance by this Court be expressed to be without prejudice and that the mandates to be issued thereon direct the modification of the decrees of dismissal so as to be without prejudice.

Durant *v.* Essex Company, 7 Wallace, 109.

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